91-180

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DAVID HILL,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEFFERY C. DUFFEY
LAW OFFICE OF
SUSAN G. JAMES AND
JEFFERY C. DUFFEY
ATTORNEY FOR PETITIONER
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MONTGOMERY, AL 36104
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89

QUESTION PRESENTED

WHETHER THE COURT'S APPLICATION OF THE SENTENCING GUIDELINES IN SENTENCING PETITIONER WAS CONSTITUTIONALLY SOUND?

(A) WHETHER APPLICATION OF THE SENTENCING GUIDELINES IS UNCONSTITUTIONAL AS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BECAUSE THEY REQUIRE THE COURT TO MAKE FINDINGS OF FACT BASED ON NON-CONSTITUTIONAL STANDARDS.

(B) WHETHER THE SENTENCING GUIDELINES ARE UNCONSTITUTIONAL AS VIOLATIVE OF THE EX POST FACTO CLAUSE WHEN APPLIED TO CONSPIRACIES THAT BEGAN PRIOR TO THE EFFECTIVE DATE OF THE SENTENCING GUIDELINES AND ENDED AFTER THE EFFECTIVE DATE OF THE GUIDELINES.

(C) CALCULATIONS OF THE GUIDELINES AND THEIR APPLICATION TO THE CASE OF THIS PETITIONER WERE INCORRECT.

(1) THE COURT ERRED IN PENALIZING PETITIONER FOR OBSTRUCTION OF JUSTICE DUE TO HIS PERSISTENT POST-TRIAL PLEA OF NOT GUILTY.

THE PARTIES

The caption in this case contains the names of all parties to this Petition. David Norman was jointly tried with Petitioner but is not a party to this Petition.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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DAVID HILL,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS AND ORDERS BELOW

On June 6, 1989, Petitioner was sentenced by Judge R. Allan Edgar of the United States District Court for the Eastern District of Tennessee, pursuant to the Sentencing Reform act of 1984 (guideline sentencing) to a term of 188 months confinement. (APPENDIX A).

The opinion of the United States Court of

Appeals for the Sixth Circuit entered on April 23, 1991, affirming the sentencing order of the District Court is a non-published opinion. United States v. David Hill, No. 89-5952 (6th Cir. 1991). (APPENDIX B).

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on April 23, 1991, and this Petition is filed within 90 days of said date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or

limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article I, Section 9 of the United States Constitution provides that:

"The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion of the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one

state, be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

STATUTORY PROVISIONS INVOLVED

(1) U.S.S.G., Section 3C1.1, which is set out in full in Appendix "C".

(2) U.S.S.G., Section 6A1.3(a), which is set out in full in Appendix "D".

STATEMENT OF THE CASE

David Hill was indicted by a federal grand jury in the Eastern District of Tennessee on November 9, 1989, which charged him and others in one count with Participating in an Unlawful Conspiracy to Distribute and to

Possess with Intent to Distribute Methamphetamine, a Schedule II Controlled Substance, in violation of 21 U.S.C. Section 841(a)(1). (R. 1-1).

A jury returned a verdict of guilty against Petitioner on April 7, 1989.

At a hearing on Petitioner's motion for release on bond pending appeal on April 11, 1989, Petitioner testified and maintained his innocence of the charge for which he was convicted. (TR. 7-14).

Prior to sentencing, Petitioner objected to numerous portions of the report of presentence investigation prepared by the probation officer. (R. 207). At the sentencing hearing, the Court reduced the base offense level from 34 to 32 based upon a recalculation of the quantity of methamphetamine involved. (TR. 8-34). All other objections to the report of presentence

investigation were overruled. (TR. 8-34).

Petitioner was sentenced on June 6, 1989, to 188 months confinement pursuant to the Sentencing Reform Act of 1984. (TR. 8-40).

Petitioner is presently serving his 188-month, non-parolable sentence at the United States Penitentiary in Atlanta, Georgia.

STATEMENT OF THE FACTS

The government's evidence showed the following:

In January, 1987, Frank Santiago ("Santiago"), an unindicted co-conspirator, began an association with Mark Ruff ("Ruff"), an indicted co-conspirator, while they were both in the United States Army. (TR. 4-6,7). This association resulted in Santiago buying large quantities of methamphetamine from Ruff. This methamphetamine was sold by Santiago to others.

Santiago left the Army in January, 1987,

and moved with his wife, Greta, to Eastman, Georgia. (TR. 4-9). He continued purchasing quantities of methamphetamine and subsequently, he and his wife moved to Athens, Georgia. (TR. 4-10). He continued obtaining methamphetamine from Ruff and selling it.

At the time Santiago moved to Athens, Co-Defendant David Norman was the proprietor of Last Chance Cycle, a motorcycle shop. After moving to Athens, Santiago had a motorcycle accident and went to Last Chance Cycle for some repair work. (All of the key witnesses in the trial were Harley-Davidson motorcycle enthusiasts and all knew Norman because of his ownership of the motorcycle shop). Santiago met Norman there. (TR. 4-12).

According to Santiago, Norman asked him if he was selling methamphetamine, and Santiago replied, "Yes." (TR. 4-13,14). During this period of time, one of Santiago's

buyers was his sister-in-law, Greta. Santiago knew that Greta was re-selling the methamphetamine she bought from him to Craig Van Riper.

Santiago testified that Norman called him and arranged for him to meet Van Riper. (TR. 4-14). (Santiago's wife, Greta, testified that it was Van Riper and not Norman who called her husband to arrange the meeting at their home [TR. 4-56]). Santiago testified that it was his "understanding" that the purpose of this meeting was for Van Riper to purchase methamphetamine from Santiago (TR. 4-16), and that this meeting took place in August, 1987. (TR. 4-70). This resulted in Van Riper purchasing some eight ounces of methamphetamine from Santiago. (TR. 4-16). During the course of their association, Santiago sold approximately 60 pounds of methamphetamine to Van Riper. (TR. 4-16).

Van Riper testified that he sold methamphetamine to Petitioner beginning in February, 1988, and continuing through July, 1988. (TR. 4-85). Van Riper stated that he first sold Petitioner a gram of methamphetamine. As time passed, Van Riper stated that Petitioner purchased increasingly larger amounts of methamphetamine. By July, 1988, Van Riper stated that Petitioner was regularly purchasing as much as two pounds a week at a price of $15,500 per pound. (TR. 4-88).

On July 23, 1988, Van Riper, his wife Melanie, Ted Fowler, and Debbie Bennett were arrested in Pigeon Forge, Tennessee, when Van Riper sold four ounces of methamphetamine to Ray Loudermilk (who was cooperating with law enforcement authorities). (TR. 4-88). Van Riper testified that he and his wife were released to the custody of Gordon Cagle, a

bondsman, on July 25, 1988. (TR. 4-90). Van Riper, his wife, Cagle and Cagle's son met Petitioner in Dawsonville, Georgia, where Petitioner gave Van Riper $30,000 in cash to use for bond for him and the other three arrested with Van Riper. (TR. 4-92).

SUMMARY OF THE ARGUMENT

Petitioner is requesting that certiorari be granted in the instant case on the basis that application of the Sentencing Guidelines in his case is unconstitutional. Specifically, Petitioner submits that this results due to the absence of a constitutionally acceptable standard of proof to be used in determining sentencing factors under the guidelines and, as such, violates his Fifth Amendment right to due process. Also, Petitioner submits that his sentence is violative of the Ex Post Facto Clause of the United States Constitution due to the

application of the guidelines in the case of an offense known as a "straddle crime" (a crime that begins before the effective date of the guidelines and ends after the effective date of the guidelines).

Petitioner also submits that the use of an obstruction of justice enhancement in the case of a defendant who maintains his or her innocence by testifying to same in a proceeding other than the criminal trial is also violative of his Fifth Amendment right against self-incrimination.

ARGUMENT

WHETHER THE COURT'S APPLICATION OF THE SENTENCING GUIDELINES IN SENTENCING PETITIONER WAS CONSTITUTIONALLY SOUND?

(A) WHETHER APPLICATION OF THE SENTENCING GUIDELINES IS UNCONSTITUTIONAL AS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT BECAUSE THEY REQUIRE THE COURT TO MAKE FINDINGS OF FACT BASED ON NON-CONSTITUTIONAL STANDARDS.

The Sentencing Guidelines have placed a tremendous burden on both the District Courts

in imposing sentences and the Appellate Courts that hear the voluminous appeals. Both District Courts and Appellate Courts faced with the mandates of the guidelines are expending valuable judicial resources as a result of guideline sentencing. A significant amount of the time and resources resulting from guideline sentencing could be avoided if this Court would review and put to rest some of the questions yet unresolved. Specifically, this Court should grant certiorari in the instant case because it poses to the Court a number of pivotal, frequently litigated, guideline issues that have far reaching constitutional questions, impacting on countless courts and criminals. Granting certiorari in this case would resolve numerous guideline issues left unresolved in Mistretta v. United States, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989).

Petitioner challenged the constitutionality of the Sentencing Guidelines as applied to his case (R. 54) which was denied by the Court. (R. 56). The Supreme Court in Mistretta v. United States, supra, held the Sentencing Guidelines constitutional when challenged on the basis of a separation of powers argument. This holding left open many other constitutional challenges.

The Sentencing Guidelines, however, do not establish a standard of proof to ensure that sentencing information is not materially false. The Guidelines only require that the information used for sentencing purposes have sufficient indicia of reliability to support its probable accuracy. U.S.S.G. Section 6A1.3(a). The other circuits initially uniformly held that a preponderance of the evidence standard of review was sufficient to ensure compliance with due process. See

United States v. McDowell, 888 F.2d 285, 290-91 (3rd Cir. 1989); United States v. Guerra, 888 F.2d 247, 250-51 (2nd Cir. 1989); United States v. Ehret, 885 F.2d 441, 444 (8th Cir. 1989), cert. denied, ___U.S.___, 110 S.Ct. 879, 107 L.Ed.2d 962 (1990); United States v. Urrego-Linares, 879 F.2d 1234, 1237-38 (4th Cir.), cert. denied, ___U.S.___, 110 S.Ct. 346, 107 L.Ed.2d 334 (1989); United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989).

The Sixth Circuit held in this particular case that a preponderance of the evidence finding was sufficient to establish the quantity of drugs to be used to determine sentencing guidelines relying on its previous decision in United States v. Carroll, 893 F.2d 1506 (6th Cir. 1990). However, the Eleventh Circuit in United States v. Terzado-Madruga, 897 F.2d 1099 (11th Cir. 1990), holding that a preponderance of the evidence standard

satisfied due process in determination of facts, left open the possibility that a higher standard of proof might later be warranted as a matter of policy. Similarly, the Ninth Circuit in United States v. Wilson, 906 F.2d 1350 (9th Cir. 1990), suggested that although a preponderance standard satisfies due process, a more stringent standard might be appropriate.

The Eighth Circuit, however, confronted with a trial court's reliance on exaggerated and fabricated facts and minute evidence elevated the standard of review to clear and convincing evidence. United States v. Burks, 934 F.2d 148 (8th Cir. 1991).

In a very-well reasoned dissenting opinion in United States v. Miller, 910 F.2d 1321 (6th Cir. 1990), Chief Judge Merritt, concerned over punishing criminal defendants without due process of law, held that "If the

government wants to imprison the [defendant] as a seller of [1,169.5] grams of cocaine, it must charge, try, and convict him of that offense and establish its proof beyond a reasonable doubt, or have him validly waive his rights and plead guilty to charge. To do anything less violates due process of law."

The jury's finding of guilty by way of a general verdict form in no way indicates that this jury believed Petitioner guilty of involvement with the 16 pounds of methamphetamine his sentence was based upon.

The Due Process Clause of the United States Constitution commands that Congress may not require that any person be incarcerated for a fixed period directly attributable to a specific fact determination unless there is proof beyond a reasonable doubt. In Re: Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970).

There is no area of the law where a higher degree of certainty is required than in a determination of facts upon which an individual is to be deprived of personal liberty. Under the sentencing guidelines, this sentencing court and others must decide numerous questions of fact based upon information which is often by necessity sparse, biased or otherwise inadequate, and the absence from the guidelines of a fixed standard of proof for the factors that affect the length of sentence, is evidence that the guidelines are violative of due process.

The only way to know for sure what quantity of drugs the jury believed Petitioner should be held accountable for would have been through the use of special verdict forms. When the information sought is relevant to the sentence which may be imposed, use of a special verdict has been upheld. United

States v. Orozco-Prada, 732 F.2d 1076, 1084 (2nd Cir. 1984); United States v. Murray, 618 F.2d 892, 895 n.3 (2nd Cir. 1980); United States v. Stassi, 544 F.2d 579, 583-84 (2nd Cir. 1976) cert. denied, 430 U.S. 907, 97 S.Ct. 1176, 51 L.Ed.2d 582 (1977); United States v. Harrell, 737 F.2d 971, 981 (11th Cir. 1984); Newman v. United States, 817 F.2d 635, 637 (10th Cir. 1987).

This Court has pointed out in U.S. v. Powell, 469 U.S. 57 (1984), that inconsistent jury verdict can be the product of mistake, compromise or lenity. It appears equally plausible that a jury could also compromise on a general guilty verdict. Since there is no way at this juncture to know the quantity of drugs the jury believed Petitioner Hill was involved with, the guilty verdict alone does not support using 16 pounds of methamphetamine for punishment purposes.

In the instant case, Petitioner submitted that the testimony of the informants, which was used to establish the base offense level, was inconsistent (TR. 8-11) and that numerous government witnesses were unreliable, had motive to lie and exaggerate, and their testimony was uncorroborated. The judge's personal findings with regard to the amount of drugs involved is not persuasive since the judge was not also the jury. (TR. 8-12).

The absence of a constitutional finding or standard of review on this issue results in a violation of the Petitioner's right to Due Process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

This Court in McMillan v. Pennsylvania, 477 U.S. 29, 106 S.Ct. 2411, 191 L.Ed.2d 67,68 (1986), stated in the extreme case, when application of sentencing factors may overwhelm the sentence that would otherwise be

imposed on the basis of proven elements, the statute cannot be constitutional. Therefore, the guidelines as applied to Hill are also unconstitutional. Furthermore, this Court needs to establish an articulated standard of proof for sentencing factors used to deprive convicted defendants of their liberty.

(B) WHETHER THE SENTENCING GUIDELINES ARE UNCONSTITUTIONAL AS VIOLATIVE OF THE EX POST FACTO CLAUSE WHEN APPLIED TO CONSPIRACIES THAT BEGAN PRIOR TO THE EFFECTIVE DATE OF THE SENTENCING GUIDELINES AND ENDED AFTER THE EFFECTIVE DATE OF THE GUIDELINES.

This Court has yet to deal with the Ex Post Facto argument as relates to the Federal Sentencing Guidelines. Petitioner submits that his Petition for Certiorari should be granted due to the existent conflict between resolution of streamlining administrative procedure and conformity of punishment (goals of the Sentencing Reform Act) and the expense of the same regarding a criminal defendant's right against retroactive punishment. The

Circuit Courts have unanimously held that conspiracies beginning before the effective date of the Sentencing Guidelines and continuing beyond the effective date of the Sentencing Guidelines are "straddle crimes" for purposes of guideline sentencing. Petitioner submits that an ex post facto violation resulting from the use of "straddle crimes" to sentence under the guidelines because the punishment is both more onerous and retroactive.

The trial court in Petitioner Hill's case relied on United States v. Ykema, 887 F.2d 697 (6th Cir. 1989), to reject Petitioner's argument that the sentence violated the Ex Post Facto Clause because the base offense level was determined in part by activities committed before November 1, 1987. (See also: United States v. Allen, 886 F.2d (8th Cir. 1989).

The Sixth Circuit in Ykema, supra, said that omitting references in the sentencing information to information that occurred before the effective date of the guidelines would cripple the use of the guidelines to bring conformity to punishment.

Other Circuits have similarly ruled. (See: United States v. Story, 891 F.2d 988 (2nd Cir. 1989); United States v. Moscony, 927 F.2d 742 (3rd. Cir. 1991) cert. denied, 111 S.Ct. 2812; United States v. Sheffer, 896 F.2d 842 (4th Cir. 1990); United States v. Boyd, 885 F.2d 246 (5th Cir. 1989); United States v. Fazio, 914 F.2d 950 (7th Cir. 1990); United States v. Tharp, 884 F.2d 1112 (8th Cir. 1989); United States v. Terzado-Madruga, 897 F.2d 1099 (11th Cir. 1990).

This Court in Miller v. Florida, 482 U.S. 423, 96 L.Ed.2d 351, 107 S.Ct. 2446 (1987), held that for an ex post facto violation to be

implicated, a law must be retroactive and it must disadvantage the offender affected by the law.

In the Petitioner's case, there is no question that application of the Sentencing Guidelines to the conspiracy is retroactive in that the conspiracy started before the effective date of the Sentencing Guidelines. The only real question becomes whether or not the fact that the conspiracy did not end until after implementation of the Sentencing Guidelines nullifies the retroactive question. There is no question, in the case of Petitioner Hill, that he is clearly disadvantaged by the retrospective application of the Sentencing Guidelines.

Caulder v. Bull, 3 Dall. 386, 1 L.Ed. 648 (1798), was one of the first cases to consider the scope of ex post facto. This case stated that the primary intent of the clause was to

restrain state and federal legislators from enacting arbitrary and vindictive legislation. In fact, it was done to prevent legislative abuses.

If the Sentencing Guidelines are applied to conspiracy cases which began long before the guidelines became effective, this would be a condonation of a legislative abuse. The ex post facto clause should preclude application of the sentencing guidelines to the total offense when some of those acts in furtherance of the conspiracy were committed prior to implementation of the guidelines and that very evidence was used to convict the defendant of the charges.

This Court has clearly set out the definition of ex post facto. This Court has only looked at the ex post facto application to State Sentencing Guidelines. In Miller, supra, this Court would not accept the fact

that notice that the law might be changed removes the obligation of the court to apply the ex post facto law. This Court, however, has not looked at the application of Federal Sentencing Guidelines to conspiracy cases.

The Supreme Court, in Lindsay v. Washington, 301 U.S. 397, 81 L.Ed. 1182, 57 S.Ct. 797 (1937), at 401-401, 81 L.Ed. 1182, 57 S.Ct. 797, stated that we need not inquire whether this is technically an increase in the punishment annexed to the crime because "[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term." In Washington, supra, as in Hill, the defendant was sentenced to a mandatory term.

The Court in Miller, supra, also addressed the fact that sentencing guidelines,

although they give the appearance of being procedural in form, fall under the ex post facto prohibitions because they alter a substantial right.

The trial court's application of the Sentencing Guidelines in this case is violative of the Ex Post Facto Clause of the United States Constitution. The impact, however, if far greater than just this case. Countless defendants are being punished excessively for crimes that began prior to the effective date of the Sentencing Guidelines.

(C) CALCULATIONS OF THE GUIDELINES AND THEIR APPLICATION TO THE CASE OF THIS PETITIONER WERE INCORRECT.

(1) THE COURT ERRED IN PENALIZING PETITIONER HILL FOR OBSTRUCTION OF JUSTICE DUE TO HIS PERSISTENT POST-TRIAL PLEA OF NOT GUILTY.

Application of a 3C1.1, U.S.S.G., enhancement in this case of a defendant who testifies after being found guilty maintaining his or her innocence in a judicial proceeding

other than the trial, or, in this case, of a co-defendant who testifies on behalf of another defendant who is later found guilty, is chilling. This Court must decide whether or not such a procedure is constitutional.

The obstruction of justice enhancement under the facts of Petitioner's case was clearly erroneously. Petitioner Hill objected to a two-level enhancement for obstruction of justice under Section 3C1.1 of the Sentencing Guidelines Manual. (TR. 8-13).

The basis for the enhancement, which was cited by the government, was that Petitioner provided false testimony at a detention hearing on April 11, 1989 (subsequent to his trial where he did not testify). Specifically, the prosecutor charged that Petitioner maintained his innocence of the charges against him. Petitioner's position was that his testimony was not false and that

his denial of guilt on the charges was merely an extension of his plea of not guilty.

The Sixth Circuit upheld the two-level obstruction of justice enhancement relying on its previous holding in United States v. Acosta Cazares, 878 F.2d 945 (6th Cir. 1989).

Petitioner Hill submits that the fact that he was convicted at trial does not mean that all of his testimony was untrue. "Suspect testimony and statements should be evaluated in a light most favorable to the defendant." United States v. Fiala, 929 F.2d 285 (7th Cir. 1991); United States v. Avery, 887 F.2d 1088 (6th Cir. 1989); United States v. Franco-Torres, 869 F.2d 797 (5th Cir. 1989). Petitioner conceded that he denied guilt at the detention hearing. This was a further extension of his not guilty plea. "When all is said and done, an upward adjustment for obstruction of justice under

U.S.S.G. Section 3C1.1 requires more than a mere conflict in the trial testimony or a jury's rejection of a defendant's alibi or denial of guilt." United States v. Akitoye, 923 F.2d (1st Cir. 1991); United States v. Emanuele, S88-Cr-652, 1989 WL 107234. The Circuit Court holding in the instant case is contrary to the law of other circuits.

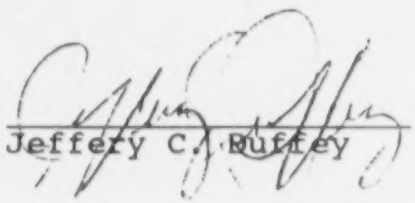
Further condonation of the unconstitutional and chilling application of this sentencing enhancement under the facts is wrong.

CONCLUSION

Petitioner submits that the issues raised in his Petition for Certiorari are of such great import that resolution by this Court will enhance judicial economy, create uniformity in sentencing, and provide certainty in punishment for those

contemplating crimes and those convicted of federal offenses.

Petitioner prays that this Court will issue a Writ of Certiorari, review the matters complained of, and reverse the decision and opinions of the District Court and the Sixth Circuit Court of Appeals.



Jeffery C. Ruffey

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN District of TENNESSEE

UNITED STATES OF AMERICA

V.

DAVID HILL

(Name of Defendant)

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number CR-1-88-00096-05

Timothy A. Deere, Appointed Counsel
1106 James Building
Chattanooga TN 37402

Defendant's Attorney

THE DEFENDANT

ATTEST:
A true copy:
Certified this
JUN 9 1989
R. MURRY HAWKINS

___ pleaded guilty to count(s) _____
_X_ was found guilty on count(s) 1
after a plea of not guilty.

By /S/ Cyndee Holder

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section

21: 846

Nature of Offense

On or about January 20, 1987 and continuing until on or about November 9, 1988: With others, known and unknown, willfully, knowingly, intentionally, and without authority, combining, conspiring, confederating, and agreeing with each other and with diverse other persons to distribute and possess with intent to distribute methamphetamine, a Schedule II controlled substance.

Count Number(s)

1

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform act of 1984.

___ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

___ Count(s) _____ (is) (are) dismissed on the motion of the United States.

___ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

_X_ It is ordered that the defendant shall pay to the United States a special

assessment of $50.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
259-74-5282

Defendant's mailing address:
Route 1, Box 1335
Dawsonville GA 30534

Defendant's residence address:
Route 1, Box 1335
Dawsonville GA 30534

June 6, 1989
Date of Imposition of Sentence

/S/ R. Allan Edgar
Signature of Judicial Officer

R. Allan Edgar, United States District Judge
Name & Title of Judicial Officer

June 6, 1989
Date

Defendant: DAVID HILL
Case Number: CR-1-88-00096-05

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED EIGHTY-EIGHT (188) MONTHS upon Count 1.

X **The Court makes the following recommendations to the Bureau of Prisons:**

Commitment to an institution with a drug-treatment program, and that defendant participate in the drug-treatment program.

X **The defendant is remanded to the custody of the United States Marshal.**

___ **The defendant shall surrender to the United States Marshal for this district,**

___ **at** _____ **a.m. / p.m. on** _____.

___ **as notified by the Marshal.**

___ **The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons**

___ **before 2 p.m. on** _____.

___ as notified by the United States Marshal.

___ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____

United States Marshal

By_____

Deputy Marshal

Defendant: DAVID HILL
Case Number: CR-1-88-00096-05

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS upon Count 1.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

___ **The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.**

The defendant shall participate in a program of treatment and testing for drug and alcohol abuse, as directed by the Probation Office, until such time as the defendant is released form the program by the Probation Office.

The defendant shall not own or possess a firearm or other dangerous weapon.

Defendant: DAVID HILL
Case Number: CR-1-88-00096-05

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $ 10,050.00 **, consisting of a fine of $** 10,000.00 **and a special assessment of $** 50.00 **.**

___ **These amounts are the totals of the fines and assessments imposed on individual counts, as follows:**

This sum shall be paid ___ **immediately.**
X **as follows:**

To be paid in a timely manner, which may include payment on an installment plan, as approved by the United States Probation Office.

___ **The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:**

___ **The interest requirement is waived.**
___ **The interest requirement is modified as follows:**

Defendant: DAVID HILL
Case Number: CR-1-88-00096-05

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;
2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
5) the defendant shall support his or her dependents and meet other family responsibilities;
6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any

paraphernalia related to such substances except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent or a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

Defendant: DAVID HILL
Case Number: CR-1-88-00096-05

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

The defendant shall participate in a program of treatment and testing for drug and alcohol abuse, as directed by the Probation Office, until such time as the defendant is released from the program by the Probation Office.

The defendant shall not own or possess a firearm or other dangerous weapon.

IT IS FURTHER ORDERED that the defendant shall pay the United States a special assessment fee of $50.00 on Count 1 of the indictment, which shall be due immediately, and that he shall pay a fine of $10,000.00 to the United States, to be paid in a timely manner, which may include payment on an installment plan, as approved by the United States Probation Office.

APPENDIX B

NOT RECOMMENDED FOR PUBLICATION

Nos. 89-5952/5953/5954/5957

FILED
APR 23 1991
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAVID HILL (89-5952); DAVID W. NORMAN (89-5953); MARK H. RUFF (89-5954); FERRELL D. CLEMENTS (89-5957), Defendants-Appellants.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE. NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently

displayed if this decision is reproduced.

Decided and Filed _____

BEFORE: NELSON and NORRIS, Circuit Judges; EDWARDS, Senior Circuit Judge.

ALAN E. NORRIS, Circuit Judge. Ferrell D. Clements, Mark H. Ruff, David Hill, and David W. Norman, appeal their convictions and sentences for conspiracy to distribute and possess with intent to distribute methamphetamine in violation of 21 U.S.C. Section 841.

Clements argues that the district court erred (1) in failing to properly advise him in accordance with Fed.R.Evid. 11 of the maximum sentence he could receive; (2) in considering conduct that he claims was not relevant pursuant to U.S.S.G. Section 1B1.3; (3) in

applying the Sentencing Guidelines where his participation in the conspiracy straddles the effective date of the guidelines, in violation of the Ex Post Facto Clause of the Constitution; and (4) in relying upon the presentence report to determine the amount of drugs to be attributed to his participation in the conspiracy.

Ruff claims that the district court erred (1) in departing upward and declining to depart downward from the Sentencing Guidelines pursuant to U.S.S.G. Sections 3B1.1 and 5K2, respectively, and (2) in using a preponderance of evidence standard, in making factual determinations at sentencing, in violation of the Due Process Clause of the Constitution.

Hill argues that (1) the district court abused its discretion in admitting a photograph which prejudiced his cause; (2) the

United States magistrate exceeded his authority in accepting the jury verdict; and (3) the district court improperly applied the guidelines to his case because (a) a preponderance of the evidence standard was employed in assessing facts included in the presentence report, (b) his sentence was not comparable to others similarly situated, and (c) his base offense level should not have been adjusted upward for obstruction of justice and should have been adjusted downward for minor participation.

Finally, Norman contends (1) that there was insufficient evidence to convict him; (2) that the court improperly allowed opinion testimony regarding the purpose of a meeting; (3) that testimony was erroneously admitted concerning other crimes or acts; (4) that his base offense level was incorrectly determined;

and (5) that the district court should have departed downward for his minor participation.

BACKGROUND

In 1986, defendant Clements and Ruff began supplying Frank Santiago[1] with methamphetamine for distribution. Santiago eventually stored the substance at his residence pursuant to Ruff's request. Ruff had mentioned to Santiago that his father-in-law, Clements, supplied the drug to Ruff and that he had seen his father-in-law's drug lab. From January 1987 until the summer of 1987, Santiago obtained methamphetamine, in one-ounce quantities, from Ruff. In the summer of 1987, Santiago met David Wayne Norman who became crucial to setting up ties for drug distributions. Norman received $50 for each

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[1]Santiago was not indicted in this case because he had previously been convicted for his participation in the conspiracy.

ounce distributed through people he introduced to his coconspirators. Hence, a drug distribution network evolved in which Ruff's father-in-law, Clements, manufactured the drug. Ruff, in turn, distributed it to Santiago, who sold the drug to Craig Van Riper [2] who in turn, with Norman's assistance, sold it to small distributors. During an eleven-month period, this network distributed about sixty pounds of methamphetamine.

In February 1988, defendant Hill met Craig Van Riper. Van Riper began distributing the drugs to Hill who received approximately seventeen pounds of methamphetamine throughout the course of the conspiracy. As Van Riper, Hill and Norman developed the distribution network in Georgia, Clements moved his

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[2]Craig Van Riper was also indicted in a prior case. Therefore, he was not a named defendant in this case.

laboratory from California to Arkansas. In November, 1988, Arkansas state police seized lab equipment and chemicals.

ANALYSIS

Counsel for Clements says in his brief that "it appears" that his client was unaware of the maximum sentence he could receive. Because the record reveals that the district court advised Clements that the maximum penalty he faced was twenty years' imprisonment, a $1,000,000 fine, and at least three years of supervised release, that concern is not well-founded.

Clements next contends that the district court improperly relied upon the presentence report to determine the amount of drugs attributable to him. However, because Clements did not specifically object to the quantity of drugs mentioned in the presentence

report -- even after the district judge asked whether he quarreled with that calculation -- the court was entitled to rely upon the presentence report at the time of sentencing. United States v. Fry, 831 F.2d 664, 668 (6th Cir. 1987). Moreover, Clements does not point out on appeal how the calculation of the amount was inaccurate.

Clements also complains that the chemicals retrieved from the lab in Arkansas are not relevant to his case. Section 1B1.3 of the Sentencing Guidelines states:

> **Section 1B1.3 Relevant Conduct (Factors that Determine the Guideline Range**
>
> **(a) Chapters Two (Offense Conduct) and Three (Adjustments)....**
>
> **(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission**

> **of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense....**

The commentary further explains:

> In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant....

U.S.S.G. Section 1B1.3, comment. (n.1).

Therefore, the court was entitled to rely on that evidence, since the lab was moved during the time frame of the conspiracy and since "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction"

are to be considered by the court. U.S.S.G. Section 1B1.3(a)(2).

Finally, Clements argues that the Ex Post Facto Clause of the Constitution is violated when the guidelines are applied to conspiracies that began prior to the effective date of the guidelines and ended after that date. This issue has been resolved by the opinion of this court in United States v. Ykema, 887 F.2d 697, 700 (6th Cir. 1989), cert. denied, 110 S.Ct. 878 (1990), which held that application of the guidelines to straddle crimes does not violate the Constitution.

Defendant Ruff first maintains that the district court erroneously found that he was an organizer and, accordingly, enhanced his sentence pursuant to section 3B1.1.[3] He also

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[3]Section 3B1.1 provides:

Aggravating Role.

argues that he and Santiago carried out the same task, but he improperly received an upward departure while Santiago did not. Whether a defendant is "'an organizer, leader, manager, or supervisor' is a question of fact reviewable 'under the clearly erroneous standard, giving due regard to the trial court's assessment of the credibility of the

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Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

witnesses.'" United States v. Barrett, 890 F.2d 855, 867 (6th Cir. 1989) (quoting United States v. Barreto, 871 F.2d 511, 512) (5th Cir. 1989)). Contrary to Ruff's contention, questions of fact upon which a court should rely in determining sentence may be resolved by a preponderance of the evidence. United States v. Carrol, 893 F.2d 1502, 1506 (6th Cir. 1990).

Because the facts reveal that Santiago, unlike Ruff, cooperated with the government and the two played different rolls in the offense, Ruff's attempted comparison of himself with Santiago is unjustified. More importantly, the record supports the court's finding with respect to Ruff's supervisory role.

Ruff's next assignment of error is that the court erroneously refused to depart

downward pursuant to section 5K.2.0[4] of the guidelines because of alleged psychological coercion by his father-in-law. That issue has been resolved in this circuit by United States v. Draper, 838 F.2d 1100, 1105 (6th Cir. 1989), where we stated:

> A sentence which is within the Guidelines, and otherwise valid, as is the case here, is not appealable on the grounds that the sentencing judge failed to depart from the Guidelines on account of certain factors which the defendant feels were not considered by the Guidelines and should reduce his sentence....

The Fourth Circuit in United States v. Bayerle, 898 F.2d 28 (4th.), cert. denied, 111 S.Ct. 65 (1990), held that an exception exists where the judge erroneously believed he did

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[4]Under section 5K.2.0, the court may depart if it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," the court may impose an alternate sentence.

not have the authority to depart downward. Bayerle, 898 F.2d at 31. That is not precisely what happened here. The district judge, in declining the downward departure observed that: "No, I don't think this is a case, that's what I am saying. I don't think, even if it were authorized, the Court doesn't think, based upon the extensive amount of drugs and the length of time that this, that this occurred, that departure is warranted on that basis."

Defendant Hill complains that the trial court erred in admitting a photograph showing him with long hair and a beard when there was no identification issue and the only intended purpose was to prejudice the jury. The proper standard of review of this evidentiary issue is an abuse of discretion. United States v. Phillips, 888 F.2d 38, 40 (6th Cir. 1989).

The photograph was relevant to supporting the description of Hill as described by certain witnesses, since defendant appeared in the courtroom with short hair and no beard. It is difficult to comprehend how Hill's prior appearance may have prejudiced his cause, however, if there was any prejudice, it cannot be said to have substantially outweighed the relevance of the evidence.

Hill's next argument, that it was error for a magistrate to receive the jury verdict, has been resolved against him by this court's opinion in United States v. Sawyers, 902 F.2d 1217, 1220 (6th Cir. 1990). He further complains that the district court made three errors in its application of the Sentencing Guidelines to his case. The first of these involves the quantity of drugs attributed to him. That argument is not well-taken in view

of the fact that the trial judge resolved facts against him, by using a preponderance of the evidence standard, in conformity with Carroll, 893 F.2d at 1506.

He also suggests that application of the guidelines, in his case, violates the Eight Amendment to the Constitution because his sentence did not parallel those meted out to others involved in the case. Those defendant received a downward departure for cooperating with the government pursuant to U.S.S.G. Section 5K1.1,[5] while Hill did not cooperate.

Hill's next assignment of error is that his base level should not have been adjusted upward for obstruction of justice pursuant to

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[5]U.S.S.G. Section 5K1.1 provides that "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines. (a) The appropriate reduction shall be determined by the court...."

U.S.S.G. Section 3C1.1.[6] Hill committed perjury when he testified during a detention hearing that he had never dealt drugs and that he had only been arrested for a traffic violation. Under these circumstances, the departure was warranted. United States v. Acosta-Cazares, 878 F.2d 945, 953 (6th Cir.), cert. denied, 110 S.Ct. 255 (1989).

Finally, Hill argues that the court erred in not departing downward as the result of his "minor participation" in the crime, pursuant to section 3B1.2 of the guidelines. The commentary to that section explains that section 3B1.2 "provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less

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[6]U.S.S.G. Section 3C1.1 states that "[i]f the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of instant offense, increase the offense level by 2 levels."

culpable than the average participant." U.S.S.G. Section 3B1.2, comment. (backg'd).

In the present case, defendant actively distributed over sixteen pounds of methamphetamine. The court found "that as a retailer, if you will, [defendant] was more caught up in the Van Riper network and was not by any means anything but a major player." The district court's evaluation is consistent with the Fifth Circuit's analysis in United States v. Buenrostro, 868 F.2d 135, 138 (5th Cir. 1989) cert. denied, 110 S.Ct. 1957 (1990), where the court determined that couriers are an indispensable part of drug distribution networks. The district court's factual findings regarding Hill's sentence are not clearly erroneous.

Although defendant Norman complains that there was insufficient evidence to convict

him, he failed to renew his motion for acquittal at the close of all the proof. Therefore, he waived any objection to the denial of his earlier motion for acquittal made at the close of the government's case-in-chief. United States v. Faymore, 736 F.2d 328, 334 (6th Cir.), cert. denied, 469 U.S. 868 (1984).

Norman also argues that the trial court committed reversible error when it permitted witnesses to testify concerning their understanding of the purpose of meetings set up by Norman, as the witnesses were giving their opinions of his state of mind. However, this is not a case, as defendant suggests, that involves testimony as to the defendant's state of mind by others. See DeLoach v. United States, 307 F.2d 653, 655 (D.C. Cir. 1962). (The court held that "conclusions or

interpretations of a witness as to the meaning of what someone said is not admissible.") In this case, each witness testified as to his own state of mind. Furthermore, lay opinion testimony concerning a defendant's state of mind is admissible under some circumstances. See Fed.R.Evid. 701; United States v. Graham, 856 F.2d 756, 759 (6th Cir. 1988), cert. denied, 489 U.S. 1022 (1989) (holding that a witness can testify, in the form of an opinion, as to his understanding of what a defendant intended when he made certain statements).

Defendant Norman next complains that the judge abused his discretion by admitting the testimony of Debbie Bennett. Bennett testified that, during the course of the conspiracy, she visited Norman at his motorcycle shop to borrow a type of drug scale

frequently used to weigh quantities of drugs for repackaging. While there, she observed Norman using the scales to weigh cocaine. Since the present case does not deal with the distribution of cocaine, Norman argues that the testimony was irrelevant and highly prejudicial. The district court found that the evidence was

> probative of motive and opportunity and intent and the other matters which are listed under Rule 404(b).
>
> It's true that it is a different drug, but it's the same kind of activity which he's accused of here, and it shows that he had certainly the opportunity to, if he had the opportunity to repackage and distribute cocaine, then he had the opportunity to repackage and distribute methamphetamine.

According to an earlier opinion of this court:

> If evidence falls within one of the exceptions of 404(b), a district court may admit the evidence if the evidence's probative value outweighs its prejudicial impact. This Court reviews a district judge's balancing

> of prejudicial impact and probative value under Fed.R. Evid. 403 in a Fed.R.Evid. 404(b) context under an abuse of discretion standard. In reviewing a district court's ruling on a Fed.R.Evid. 403 objection, this Court "look[s] at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." Furthermore, a district court should exclude evidence under Fed.R.Evid. 403 "only where the probative value of the relevant evidence is substantially outweighed by the danger of unfair prejudice."

United States v. Pollard, 778 F.2d 1177, 1179 (6th Cir. 1985) (emphasis in original) (citations omitted). See also United States v. Robison, 904 F.2d 365, 368 (6th Cir.), cert. denied, 111 S.Ct. 360 (1990) (where this court affirmed the district court's decision to admit evidence of prior drug dealing to show defendant's intent to distribute rather than merely use). In the present case, the evidence was probative of opportunity, intent and knowledge. Defendant has not demonstrated

that the danger of unfair prejudice substantially outweighed the probative value of the evidence.

Norman also complains that the district court erred in assessing the quantity of drugs attributable to him during sentencing. The court based defendant's initial offense level on the amount of drugs sold by dealers he brought into the organization and for which he received a commission. Defendant argues that the testimony regarding the amount of compensation he received in exchange for producing buyers is not credible and should not be utilized in determining his base offense level. However, since no drugs were seized, the trial court was warranted in examining other factors, such as the amount of money exchanged, in order to approximate the quantity of drugs involved. see U.S.S.G.

Section 2D1.4, comment (n.2).[7] The district court could have established defendant's base level based upon all the drugs distributed by those who became distributors as a result of Norman bringing them into the organization. See U.S.S.G. Section 1B1.3, comment (n.1).[8] Consequently, defendant's base offense level is conservative and proper.

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[7]U.S.S.G. Section 2D1.4, comment (n.2) provides:

> Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

[8]U.S.S.G. Section 1B1.3, comment (n.1) provides that a defendant is accountable for conduct that he "counseled, commanded, induced, procured, or willfully caused" during the commission of the offense of conviction

Finally, Norman claims that the court's decision not to depart downward for his "minimal participation" pursuant to U.S.S.G. Section 3B1.2, is erroneous. In view of earlier discussion in this opinion concerning appeals from refusals to depart, and our being unable to say the guidelines were in this instance applied to Norman in violation of law, the argument is not well-taken.

For the reasons stated, the judgments of conviction and sentences are **affirmed**.

APPENDIX C

Section 3C1.1. Willfully Obstructing or Impeding Proceedings

If the defendant willfully impeded or obstructed, or attempted to impede or obstrut the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by 2 levels.

APPENDIX D

Section 6A1.3. **Resolution of Disputed Factors** (Policy Statement)

(a) When any factor imporant to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a facctor important to the sentencing determination, the court may consier relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(c) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed.R.Crim.P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonably opportunity for the submission of oral or written objections before imposition of sentence.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

FILED
NOV 9 1989
CLERK
BY /S/ Mary Hartman
Deputy Clerk

UNITED STATES OF AMERICA	)	
	)	
V.	)	**NO.CR. 1-88-96**
	)	
FERRELL DEAN CLEMENTS, FRANK BERNARD BREITKRUETZ, MARK HOWARD RUFF, TIMOTHY A. CASTLE, DAVID HILL, and DAVID WAYNE NORMAN	)	

INDICTMENT

COUNT I

The Grand Jury charges that from on or about January 20, 1987, and continuing until on or about November 9, 1988, within the Eastern District of Tennessee and elsewhere, the defendants, FERRELL DEAN CLEMENTS, FRANK BERNARD BREITKREUTZ, MARK HOWARD RUFF, TIMOTHY A. CASTLE, DAVID HILL AND DAVID WAYNE NORMAN, along with Frank Santiago and Craig Van Riper,

unindicted coconspirators herein, and other persons known and unknown to the Grand Jury, did willfully, knowingly, intentionally, and without authority, combine, conspire, confederate, and agree with each other and with diverse other persons, to distribute and possess with intent to distribute methamphetamine, a Schedule II controlled substance in violation of 21 U.S.C. Section 841(a)(1).

PURPOSE

The purpose and object of the conspiracy was for the defendants, FERRELL DEAN CLEMENTS, FRANK BERNARD BREITKREUTZ, MARK HOWARD RUFF, TIMOTHY A. CASTLE, DAVID HILL, and DAVID WAYNE NORMAN, along with Frank Santiago and Craig Van Riper, unindicted coconspirators herein, and other persons known and unknown to the Grand Jury, to receive money and derive profit

from the illegal sale and distribution of methamphetamine.

METHODS AND MEANS

To accomplish the purpose of the conspiracy the defendants, FERRELL DEAN CLEMENTS, FRANK BERNARD BREITKREUTZ, MARK HOWARD RUFF, TIMOTHY A. CASTLE, DAVID HILL, and DAVID WAYNE NORMAN, along with Frank Santiago and Craig Van Riper, unindicted coconspirators herein, and other persons known and unknown to the Grand Jury, used the following methods and means, among others:

(a) Acts involving the felonious distribution and possession with the intent to distribute methamphetamine, within the Eastern District of Tennessee and elsewhere, in violation of Title 21, United States Code, Section 841(a)(1);

(b) Acts of knowingly and intentionally using a communication facility, within the Eastern District of Tennessee and elsewhere, in committing, causing, and facilitating the commission of violations of Title 21, United States Code, Sections 841(a)(1) and 846, in violation of Title 21, United States Code, Section 843(b);

(c) Acts of knowingly and intentionally traveling in interstate commerce with the intent to promote, manage, facilitate, and carry on an illegal business activity, to wit: the possession with the intent to distribute and the distribution of methamphetamine, in violation of Title 18, United States Code, Section 1952(a);

(d) Acts of knowingly and intentionally traveling in interstate commerce with the intent to distribute the proceeds of

the illegal methamphetamine distribution, in violation of Title 18, United States Code, Section 1952(a).

It was a part of the conspiracy that FERRELL DEAN CLEMENTS and FRANK BERNARD BREITKREUTZ would manufacture quantities of methamphetamine for distribution.

It was a further part of the conspiracy that FERRELL DEAN CLEMENTS and FRANK BERNARD BREITKREUTZ would supply and provide MARK HOWARD RUFF with quantities of methamphetamine for redistribution to other coconspirators including Frank Santiago and Craig Van Riper.

It was a further part of the conspiracy that MARK HOWARD RUFF and TIMOTHY A. CASTLE would supply and provide other coconspirators

including Frank Santiago and Craig Van Riper with quantities of methamphetamine in exchange for cash.

It was a further part of the conspiracy that DAVID HILL would obtain quantities of methamphetamine from other coconspirators including Craig Van Riper, for the purpose of redistributing that methamphetamine for profit.

It was a further part of the conspiracy that MARK HOWARD RUFF and TIMOTHY A. CASTLE would collect and obtain the cash proceeds of the methamphetamine sales from coconspirators including Frank Santiago and Craig Van Riper and redistribute portions of those proceeds to

coconspirators FERRELL DEAN CLEMENTS and FRANK BERNARD BREITKREUTZ.

[21 U.S.C. Section 846]

/S/ Henry G. Payne
FOREMAN, GRAND JURY

/S/ John Gill by S.C.
United States Attorney

CERTIFICATE OF SERVICE

I, Jeffery C. Duffey, a member of the Bar of the Supreme Court of the United States and attorney for Petitioner, hereby certify that on this 22nd day of July, 1991, I placed the foregoing Petition in the United States Mail, First Class, Postage Prepaid, to Honorable William K. Suter, Clerk, United States Supreme Court, 1 First Street, N.W., Washington, D.C., 20643, and I served the correct number of copies of the Petition on John W. Gill, Jr., United States Attorney, 354 Federal Building, Chattanooga, Tennessee, 37402, and on the Solicitor General, Department of Justice, Washington, D.C. 20530, by First Class Mail, Postage Prepaid.

Jeffery C. Duffey
Attorney for Petitioner